IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 19, 2008

STATE OF TENNESSEE v. CURTIS WORD

Appeal from the Circuit Court for Moore County
No. 1059 Robert Crigler, Judge

No. M2008-00390-CCA-R3-CD - Filed January 29, 2009

The defendant, Curtis Word, pleaded guilty to one count of conspiracy to sell less than one-half gram of a Schedule II controlled substance, cocaine, and two counts of selling a Schedule III controlled substance, dihydrocodeinone. All three offenses are Class D felonies. He was sentenced as a Range I, standard offender to three years' confinement on each count, to be served concurrently. Appealing the manner of serving the sentences, the defendant contends the trial court erred in denying him an alternative sentence. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Donna Orr Hargrove, District Public Defender, and Andrew Jackson Dearing, III, Assistant Public Defender, for the appellant, Curtis Word.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Charles Frank Crawford, Jr., District Attorney General; and Hollyn H. Eubanks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The facts recited at the guilty plea acceptance hearing showed that an undercover officer went into an apartment on January 11, 2007, and asked the defendant and another man, Dewayne Smith,[1] where he could purchase a twenty-dollar rock of cocaine. The defendant, while holding a crack pipe, said that if the officer gave him twenty dollars, he would provide him with a rock. The officer gave the defendant the money. The defendant looked at Mr. Smith, who told the officer that he would provide him with thirty dollars' worth of cocaine for twenty dollars if the officer would drive him to another residence. The officer agreed, the defendant gave the twenty dollars to Mr. Smith, and

[1] The record reflects spellings of Mr. Smith's first name as "Dewayne," "DeWayne," and "Dwayne."

Mr. Smith handed the officer rocks of crack cocaine in a cellophane cigarette packet wrapper. These rocks consisted of one-tenth of one gram of cocaine.

On January 18, 2007, the same undercover officer went to the same apartment. The officer asked the defendant's girlfriend to see the defendant, whom he asked to sell him hydrocodone. The defendant told his girlfriend to go to another apartment to acquire the hydrocodone. She returned and told the defendant that the other apartment only had four pills, and she handed them to the defendant. The officer said that the quantity sufficed. The defendant confirmed that the price for each pill was five dollars. The defendant accepted the officer's twenty-dollar bill. The defendant asked the officer which type of hydrocodone he preferred. The defendant told the officer to come back for more pills. These four pills were tested, and they contained dihydrocodeinone, a Schedule III controlled substance.

On February 2, 2007, the same officer went to the same apartment to buy hydrocodone. The defendant said he had only two pills at that time and that the price was five dollars per pill. The officer attempted to pay with a twenty-dollar bill, but the defendant told him to pay him the next time because he did not have change. The officer left and returned with a ten-dollar bill, and he told the defendant that it was the money owed the defendant from the last pill purchase. The defendant accepted the bill. The pills were tested, and they contained dihydrocodeinone, a Schedule III controlled substance.

At the sentencing hearing, Larry Campbell of the Moore County Sheriff's Department testified that he was "very familiar" with Moore County's drug problem involving methamphetamine, crack cocaine, prescription drugs, and marijuana. He stated that people would obtain prescription drugs and sell the extra pills to people to whom the medication had not been prescribed. He said that hydrocodone was "extremely addictive." He stated that drug users and drug sellers were not making positive contributions to society and were, in fact, affecting other citizens by overdosing, driving while under the influence, and causing violent crime through their drug sales. He said that deterring drug sales would improve the quality of life in Moore County, which he described as "small" and "clannish." He said the three drug sales in the instant case occurred in an apartment complex, where a number of people, potentially children, lived.

On cross-examination, Larry Campbell testified that he was not the undercover officer involved in the three sales. He testified that the quantity of cocaine involved in this case, one-tenth of one gram, was a typical amount for a transaction. He said that although he had not known at the time of the hydrocodone sales that the defendant had broken his neck in a car accident or that he had been diagnosed with breast cancer, he did know that the defendant was disabled and that he had been selling drugs.

The defendant testified that he was forty-six years old and that he had been an inmate for 186 days at the time of the sentencing hearing. He admitted that he had smoked crack cocaine and that he held a crack pipe when the officer arrived at the apartment. He said he had known Mr. Smith since childhood, but he claimed he had not known Mr. Smith was selling cocaine. He did say,

however, that the crack cocaine he was smoking came from Mr. Smith. The defendant stated that he had been in three car accidents, two of which resulted in serious injuries, including a broken neck and partial paralysis in 2000. He said that the first serious accident in 1989 crushed both hips and both knees and that he lost sight in one eye and hearing in one ear. He stated he had been prescribed hydrocodone and Xanax for eighteen years. He said that he had been "disabled" since the 1989 accident and that he had received disability checks since 2000. He stated that he was "supposed to be a paraplegic." He said he wanted to leave the jail to have surgeries to remove his breast cancers and to correct his still existing hip problems. He said that if he did not have the hip surgeries, he would "completely stop walking." He said that he had not yet had cancer treatments but that his cancers ranged from the size of a marble to the size of a golf ball.

The defendant testified that his disability check amount was $623 per month and that his rent was $350. He said he could not specify the amount of his utility expenses. He said he sold drugs to pay for transportation to his medical appointments. He admitted having a felony conviction for conspiracy to sell a Schedule II controlled substance, a misdemeanor assault conviction, and a driving under the influence ("DUI") conviction. He said his DUI probation had been revoked and reinstated. He said he had not been on parole, probation, or community release at the time of the three instant offenses. He claimed he was serious about complying with the terms of his sentence because selling drugs was not worth the 186 days he had spent in jail. He said that his brother would take him to his medical appointments and that he, the defendant, would take care of his medical problems. He said that he had been on Social Security disability before being incarcerated and that once he was out of jail he would seek to be reinstated.

On cross-examination, the defendant testified that his DUI conviction was unrelated to any of the three car accidents. He admitted that although he was disabled, he had managed to engage in conduct meriting misdemeanor assault and felony drug convictions. He did not dispute the accuracy of records showing his felony drug probation had been revoked not once but three times. He said that he could not remember that or why the probation had been revoked.

The defendant's brother, William Richard Word, testified that he was a car salesman in Nashville and that he had helped care for his brother through all three car accidents. He stated that it was miraculous that his brother was still living and was not completely paralyzed. He said the defendant needed both hip and cancer surgeries. He said that he would help his brother with transportation, reinstatement of his Social Security benefits, and anything else his brother would need. He stated that he did not condone selling drugs and that he would keep his brother with him to prevent him from selling drugs. He said he needed his brother's construction knowledge in some business transactions he was planning.

On cross-examination, William Word claimed he had not known before his brother's 1992 trial that he had sold drugs. He admitted he had not known his brother's probation from that offense had been revoked three times. He acknowledged that his brother was an adult and that he would not be around him twenty-four hours each day.

The defendant argued for a sentence of split confinement consisting of the 186 days already spent in jail and probation. The defendant claimed he needed medical treatment to prevent his paralysis and death from cancer. The defendant also claimed that probation would better suit the defendant than community corrections, as the latter would present him with a transportation problem. Arguing against alternative sentencing, the State asserted that the defendant's medical problems were not a "get out of jail free card" and that he should not be returned to the environment in which he arranged a drug sale and sold drugs. The State also said that given his brother's support, the defendant had not needed to sell drugs to earn extra money.

The trial court considered the statements presented at the plea acceptance hearing, the presentence report, the principles of sentencing and the arguments for sentencing alternatives, the applicability of mitigating and enhancement factors, and the defendant's testimony regarding his potential for rehabilitation. The trial court found that the defendant pled guilty to three felonies and was a Range I, standard offender. It noted that a Class D felon should be considered a favorable candidate for alternative sentencing in the absence of evidence to the contrary. T.C.A. § 40-35-102(6) (2006). Although the trial court stated it did not place great weight on them, it found that the following mitigating factors from Code section 40-35-113 (2006) were applied:

> (1) The defendant's criminal conduct neither caused nor threatened serious bodily injury;
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> . . .
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> (7) The defendant was motivated by a desire to provide necessities for the defendant's family or the defendant's self;
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> . . .
>
> (13) Any other factor consistent with the purposes of this chapter [the defendant pleaded guilty to three of the charges rather than forcing the State to try him on each offense of the indictment.]

The trial court found that factor (1) applied only to the two convictions for sale of a Schedule III controlled substance, dihydrocodeinone. The court found that factor (7) applied to all three convictions, and that factor (13) applied only to the conviction for conspiracy to sell less than one-half gram of a Schedule II controlled substance, cocaine.

The trial court found that the following enhancement factors from Code section 40-35-114 (2006) applied to all three of the defendant's convictions:

> (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;

> (8) The defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community.

The trial court found that the defendant had been convicted of DUI in 1987 (with all except two days of the sentence suspended), conspiracy to sell cocaine in 1992, and a misdemeanor assault in 1996 that had been reduced from an aggravated assault charge and for which he had not been granted alternative sentencing. The trial court also noted that the presentence report showed the defendant had smoked marijuana since he was eleven years old. The trial court found that the defendant's previous probation for three years had been revoked three times and that he had ultimately served the sentence and been paroled.

The trial court imposed a three-year sentence for each Class D felony conviction to be served concurrently. The trial court denied alternative sentencing after finding that confinement was necessary (1) to protect society from the defendant's criminal conduct, (2) to avoid depreciating the seriousness of the crime, and (3) measures less restrictive than confinement had been unsuccessfully applied to the defendant. T.C.A. § 40-35-103(1)(A)-(C) (2006).

On appeal, the defendant contends that he should receive probation because he is a Range I, Class D felon and does not meet the criteria for incarceration listed in Code section 40-35-102(5) (2006). He argues that the nature of his convictions does not meet the criteria for denying probation on account of a crime's nature. See State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981). He also asserts there is no evidence in the record demonstrating the deterrent effect of the defendant's sentence, proof that is required by State v. Ashby, 823 S.W.2d 166, 170 (Tenn. 1991). The defendant contends that in the alternative he qualifies for sentencing under the Community Corrections Act because his crimes were not violent in nature and he has special needs. The defendant argues that this court should reduce the defendant's sentence to one "more appropriate for the crimes committed." The State responds that the trial court properly denied alternative sentencing in view of the court's findings that confinement was necessary and the testimony regarding the need for deterrence.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d), -402(d) (2006). This presumption of correctness is conditioned upon the affirmative showing that the trial court considered the relevant facts, circumstances, and sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to section 40-35-401(d) note, the burden is now on the appealing party to show that the sentence is improper.

When determining if confinement is appropriate, the trial court should consider whether (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. T.C.A. § 40-35-103(1)(A)-(C) (2006). The trial court may

also consider a defendant's potential or lack of potential for rehabilitation and the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. §§ 40-35-103(5) (2006), -210(b)(5) (2006); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed. T.C.A. § 40-35-103(4) (2006).

When a defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony, the defendant should be considered as a favorable candidate for alternative sentencing in the absence of evidence to the contrary. T.C.A. § 40-35-102(6) (2006). Such a consideration may be overcome by the State with "evidence to the contrary." Id.

In the present case, we conclude there was ample evidence showing the defendant was not a suitable candidate for alternative sentencing. The defendant had a history of criminal conduct, including a felony drug conviction. Although he received a probationary sentence for his felony drug offense and a suspended sentence (after two days' incarceration) for his DUI conviction, the defendant demonstrated he could not comply with release into the community, given that his probation in the drug case was revoked three times. Additionally, he continued to engage in criminal behavior after serving his sentences and was later convicted of misdemeanor assault. The trial court noted it would be inappropriate to impose probation on a defendant whose prior probation had been revoked three times. We agree. The defendant has not met his burden to demonstrate that the manner of service for his three sentences was improper.

Based on the foregoing and the record as a whole, we affirm the judgments of the trial court.

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JOSEPH M. TIPTON, PRESIDING JUDGE